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ROYAL COURT
(Samedi Division) 123.

5th July, 1995

Before: The Deputy Bailiff, Single Judge

In the matter of the Representation of AB, made pursuant to the Court's inherent jurisdiction, seeking the appointment of a guardian *ad litem* of CD, a person of unsound mind resident outside the jurisdiction, so as to enable CD to institute legal proceedings within the jurisdiction.

Advocate A.P. Begg for the Representor.
The Solicitor General convened as *Amicus curiae*.

JUDGMENT

THE DEPUTY BAILIFF: I have before me a representation of Mrs. AB.

The representor wishes to be appointed guardian *ad litem* of CD to enable him to bring an action jointly with his brother against their brother PD.

CD was admitted to a psychiatric hospital in County Dublin on 18th June, 1960. I have a letter from the consultant psychiatrist of the hospital which shows that CD's mental state is such that he would not, in the opinion of the consultant psychiatrist, be able to make any decisions regarding his business affairs.

Time is of the essence of the application. There are, apparently, sought in the proposed Order of Justice injunctions to prevent PD from disposing of substantial properties, in the words of the Order of Justice, *"by conveyance, share transfer, or otherwise"*.

The proposed Order of Justice alleges a partnership and a breach of the terms of that partnership.

It is necessary to state that CD has never had a guardian or the equivalent of a curator appointed for him in any jurisdiction.

Advocate Begg came before me in the Samedi Court on the afternoon of 30th June, 1995, with his *ex parte* application. The

Court adjourned the representation for legal argument. The Court suggested that an *amicus curiae* be appointed and H.M. Solicitor General has given me invaluable and deeply considered advice today.

Advocate Begg can find no statutory authority to help him. He relies on the inherent jurisdiction of the Court and asks me to apply the facts of this case to apparently analogous situations.

In England, under R.S.C. Order 80/2/16 ***"no order is necessary for the appointment of a next friend or a guardian ad litem of an infant or a patient"*** except in three cases which do not apply to the facts of this case, but the application may apparently be granted by a written consent given by the next friend or guardian and filed at the appropriate office.

The problem, of course, is that CD is not in Jersey and I cannot see anything that allows me to circumvent by the use of inherent jurisdiction something that is established law and procedure.

Both Advocate Begg and the Solicitor General relied upon Bastion Offshore Trust Co Ltd v. Finance & Economics Committee (9th October, 1991) Jersey Unreported CofA pp.15 et seq; (1991) JLR N.1. At p.15 of its Judgment the Court of Appeal said this:

> *"Practitioners in these Courts and in the Courts of Guernsey are familiar with the maxims 'La Cour est toute puissante' and 'The Court is master of its own procedure'. The better known a proposition is the harder it is to find authority for it and so it turns out if one seeks judicial statements of the two maxims (though in Guernsey the Court of Appeal relied on the second maxim in Cherub Investments Ltd v. The Channel Islands Aero Club (Guernsey) Ltd decided on 13th January, 1982, at p.6 of the report).*
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> *Both maxims are expressions of the inherent jurisdiction of the court. So far as English law is concerned the inherent jurisdiction of the court has been said to be a virile and viable doctrine, and has been defined as being*
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> > *'the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them'. (Halsbury's Laws Vol. 37 4th Ed. title Practice and Procedure paragraph 14).*
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> *Reference is there made to a lecture on the topic given by Sir Jack (then Mr. I.H.) Jacob in 1970 and published in 23*

Current Legal Problems pp.23-52. The definition quoted above first appeared in that erudite and authoritative lecture and it has been approved judicially in Canada and New Zealand.

One feature of the inherent jurisdiction is that it can exist alongside an identical or similar rule of court. The court does not lose its power because a rule is made (though there may be many cases where the Court will have no need to look outside the text of the rule). Striking out pleadings is the classic example of overlap of powers. The fact that the Rules of the Supreme Court in England make express provision for striking out and dismissing an action or pleading has been held not to displace the Court's inherent power to do so. As Sir Jack Jacob said in his lecture: "The inherent jurisdiction of the court is a most valuable adjunct to the powers conferred on the court by the Rules".

The inherent jurisdiction argument in my view cannot run counter to a current feature of the law. We are dealing with the representation in legal proceedings of someone who is under disability.

In the examination by Sir John Awdry of the Attorney General in the Report of the Commissioners, 1861, there is a discussion with members of the legal profession and we find Mr. Evans (an English solicitor) talking of the guardianship of minors in this way:

The question was put to him:

"Does the court exercise any discretion in inquiring what title they have to call themselves the next friends of the infant?

No; it is generally so well known here that no difficulty arises in such cases.

Very often persons are appointed guardians, merely to have some one who may sue or be sued, as in the case which has been quoted, I think, I was sued as guardian. The parents had died in the Island, leaving an infant eldest son. He had but little property, which the creditors wanted to get at, and it was necessary to appoint a guardian to the infant son, in order that the creditors might sue the guardian, take possession of the property and distribute it. That frequently is the case here. The law of Jersey is that if there is no will the principal heir becomes at once seized of the property. It often occurs, especially with strangers, that there would be difficulty in rendering an account, for you would sometimes place the

guardian in a curious position if you say he shall account, because the officer seizes, takes possession of the estate, pays the creditors, and there is an end of it."

Although attention is being drawn to the need for a *tuteur* to be appointed, and we are talking in this case of a guardian *ad litem*, there is no ground here for distinguishing between the forms of disability.

We have then a cumbersome procedure outlined in the Commissioners' Report where the full machinery of a *tutelle* had to be employed in order for an infant to be able to commence or defend proceedings. It was suggested even in 1861 that changes were necessary but it was only when the Royal Court Rules were introduced that a final solution was found. No examples of a guardian *ad litem* being appointed before the 1963 Rules were shown to us where the Court had relied - as Mr. Begg asked us to rely today - on its inherent jurisdiction. Advocate Begg had clearly made a careful trawl through the Table des Décisions but none of the cases that he highlighted to us were particularly in point.

Much the same procedure as applies in a *tutelle* applies for a person under a mental disability. As was said by Poingdestre: "Lois et Coûtumes de L'Ile de Jersey" (Jersey, 1928): pp.198-200:

"C'est une Regle en Droict, que celuy auquel l'Administration de son bien est interdite, soit Prodigue, Decocteur, Insensé ou autre ne peut de la en auant faire contract ou acte qui regarde ladite Administration, sans l'authorité de son Curateur (s'il en a) ou Decret ou Acte de Justice, fait en presence de ceux qui y ont Interests soient parents ou Crediteurs, lesquels y auront esté appellez legitimement & en bonne forme, & apprez cognoissance de cause."

The inability to act without some form of guardianship is clear: as Le Geyt says in his Privileges, Loix et Coustumes de L'Isle de Jersey (Jersey, 1953): titre V: des Procureurs:

"Les Mineurs de 20 ans & les personnes imbeciles sont incapables de toutes sortes de Procurations."

Again, at titre VIII: des Administrateurs & Curateurs:

"Les Curateurs se choisissent, instituent & conduisent à peu près aussi comme les Tuteurs, par l'avis des Parens, Voisins & Amis, & se donnent faute de bon Sens ou pour Cause de Prodigalité. Mais la personne qu'on met en Curatelle doit estre prealablement assignée ou presentée en Justice.

La Curatelle porte deffense à tous de contracter avec la personne interdite."

The Royal Court (General) (Jersey) Rules, 1963, state that:

"An infant may commence, prosecute, defend, intervene or make any application in any action before the Court by a guardian ad litem appointed for that purpose."

Under the Matrimonial Causes (General) (Jersey) Rules, 1950, at Article 51(2):

"A minor who has no guardian and a person of unsound mind who has no curator may apply to the Court ex parte through his next friend, in or out of term, for the appointment of a Guardian ad litem, by whom he may commence, prosecute, defend, intervene or make any application in, any cause to which these Rules relate."

The Mental Health (Jersey) Law, 1969, however, at Article 50(17) states:

"Where it appears to a curator to be necessary or expedient for any of the purposes of paragraph (15) of this Article to arrange for or authorize -

(c) the conduct of legal proceedings in the name, or on behalf, of the interdict,

he shall apply to the Court for consent to his action setting out the grounds on which he considers such action to be necessary or expedient for any such purpose and the Court, except in a case where a power to be exercised under sub-paragraph (d) of this paragraph is a power of appointing trustees or retiring from a trust, shall appoint two Jurats to examine the application and the grounds on which it is founded and, if both the Jurats so appointed are satisfied that the proposed action of the curator is necessary or expedient as aforesaid, they shall deliver to the curator their consent in writing to the action to which the application relates, and, where both the Jurats so appointed are not satisfied, they shall submit to the Court a report in writing setting out their reasons for withholding their consent and the Court shall make such order in the matter as it thinks just."

Advocate Begg pointed out, quite rightly, that the Law refers only to interdicts within the jurisdiction. This Court has always recognised, for example, a Court of Protection Order made by the High Court but that analogy does not help me here because the information that I have is so very limited.

If, as Advocate Begg suggests, I can appoint a guardian *ad litem* in order to prevent, as he puts it, the interests of justice being defeated, I must ignore all the necessary safeguards that the laws of this jurisdiction insist on for such a contingency. He argues that because a person under disability is outwith this jurisdiction he does not fall within these constraints.

I can accept that the Court has a wide inherent jurisdiction but it cannot be so wide as to allow Advocate Begg to formulate the argument that the end justifies the means for these particular purposes.

The person who is to act for the mentally handicapped brother must be *fondé en pouvoir*. I cannot say that there is a gap in the Royal Court Rules which I can fill merely by analogy.

It seems to me that as the Law of this Island stands at present, I must have better support to this application than a letter written on 22nd June by a consultant psychiatrist who gives no better conclusion to his letter than that the Hospital is taking legal advice from the Health Board Solicitors as to the best course to take in the patient's interest.

I have much sympathy with Advocate Begg's clients but at this time it is not possible to allow the matter to proceed and the Representation on the basis that it is put forward to me is refused.

I may take this opportunity as an occasion to ask if the Rules Committee might consider amending the Royal Court Rules appropriately.

Authorities

Royal Court Rules, 1992: Rule 4/3-8; 13.

Royal Court (General) (Jersey) Rules, 1963.

Matrimonial Causes (General) (Jersey) Rules, 1979: Rules 51, 56.

R.S.C. (1993 Ed'n): O.80.

Mental Health Jersey Law, 1969: Article 50.

4 Halsbury: 13: paras. 729-731.
: 30: paras. 1421-1426.
: 37: paras. 240.

Report of the Commissioners into the Civil Laws of Jersey, 1861: Evidence: pp.597, 601-2, 614.

Poingdestre: "Lois et Coûtumes de L'Ile de Jersey" (Jersey, 1928): pp.198-200.

Le Geyt: "Privilèges, Loix et Coustumes de L'Isle de Jersey" (Jersey, 1953): pp.18, 22.

Bastion Offshore Trust Co Ltd v. Finance & Economics Committee (9th October, 1991) Jersey Unreported CofA pp. 15 et seq; (1991) JLR N1.